NO. 56461-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY MICHAEL KELLY,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 05-1-01173-6

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-RESPONDENT

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I. REPLY IN SUPPORT OF STATE'S APPEAL

A. Introduction

The State appealed the trial court's order, issued in a *Blake*[1] hearing, more than 12 years after Timothy Kelly's sentence in this case became final, on the grounds that the trial court exceeded its statutory authority with respect to the firearm enhancements. Kelly urges this court to not reach the merits of the State's appeal on the grounds that the State did not object to the unlawful order in the trial court. But this court has the power and duty to correct an unlawful sentence on appeal, whether or not the error was first raised in the trial court.

The trial court ordered that Kelly's two firearm enhancements be served concurrently, rather than consecutively. This order was "illegal" or "invalid" as the legislature has ordered that all firearm enhancements be served concurrently. While Kelly makes an impassioned plea that the statute be ignored, binding supreme court precedent bars his request.

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[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

B. Statement of the Case[2]

The defendant, Timothy Michael Kelly, was charged by second amended information with two counts of burglary in the first degree with firearm enhancements, three counts of theft of a firearm in the first degree, three counts of theft in the first degree, and two counts of unlawful possession of a firearm in the first degree. CP 17. The crimes involved two separate victim residences, homes owned by James and Carol Eva and by Kathy Lykken. CP 6. A jury convicted Kelly on all charges. *See* CP 17, 29, 42 FOF 1.

Based on an extensive criminal history that was supported by certified copies of Kelly's prior judgment and sentences, 2006 RP 26-27, [3] Kelly's offender score for each crime was calculated as follows:

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[2] The previously filed Brief of Appellant contained a statement of the case that was sufficient to resolve the State's appeal. This brief contains an expanded statement of the case in response to Kelly's request that if the State prevails the matter be remanded to the trial court for resentencing, Brief of Respondent/Cross-Appellant at 24, and in response to Kelly's cross-appeal.

[3] The State's motion to transfer the transcript of Kelly's 2006

Count	Offense	Offender Score	Standard Range
I	Burglary in the First Degree	26.5	87-116 mos + 60 mos firearm enhancement
II	Theft of a Firearm	21.5	77-102 mos
IV	Theft in the First Degree	22.5	43-57 mos
V	Burglary in the First Degree	26.5	87-116 mos + 60 mos firearm enhancement
VII	Theft in the First Degree	22.5	43-57 mos
VIII	Theft in the First Degree	22.5	43-57 mos
XIII	Unlawful Possession of a Firearm in the First Degree	21.5	87-116 mos
XIV	Theft of a Firearm	21.5	77-102 mos
XV	Theft of a Firearm	21.5	77-102 mos
XVI	Unlawful Possession of a Firearm in the First Degree	21.5	87-116 mos

sentencing hearing from his first appeal, COA No. 35057-2-II, was granted on July 8, 2022. Because both the original sentencing hearing transcript and the *Blake* hearing transcript begin with page "1," the State will refer to the original sentencing hearing transcript as "2006 RP," and the *Blake* hearing transcript as "2021 RP."

CP 25, 29.

A sentencing hearing was held in this case on December 14, 2006. 2006 RP 1. In light of Kelly's astronomical offender scores, the State requested an exceptional sentence pursuant to RCW 9.94A.535(2)(c). 2006 RP 6. The State also requested that the sentence imposed in this matter run consecutive to the sentence imposed upon Kelly upon his convictions for burglarizing the Richards' residence.[4] 2006 RP 8. The State made this request to ensure that Kelly would be punished for victimizing all three families—the Evas, the Lykkens, and the Richards. 2006 RP 9, 19-20. The State's final recommendation was for a sentence of 30 years to be served consecutively to the 10-year sentence imposed in the Richards matter. 2006 RP 9-12, 18-29.

[4] Kelly was convicted of the burglary of the Richards' residence in cause number 05-1-00889-1. *See* CP 35. Kelly has filed a separate appeal in 05-1-00889-1 that has been linked with the appeal in this matter. *See State v. Kelly*, COA No. 56475-1-II.

Kelly requested imposition of a standard range sentence to be served concurrently with his sentence in the burglary of the Richards' residence. 2006 RP 15-17. His exact request was for 176 months.

So as to avoid "free crimes," the trial court ordered that Kelly's sentence in this matter would run consecutively to his sentence for burglarizing the Richards' residence. 2006 RP 22-23, 28; CP 35. The court also ordered the sentences for the two burglary convictions with firearm enhancements to run consecutively to each other but imposed a bottom range sentence on one of the two burglaries rather than the top of the range sentence requested by the State. 2006 RP 23-24; CP 2-44. The final sentence was 338 months to run consecutively to the sentence imposed in 05-1-00889-1. CP 45-46.

Kelly appealed both his convictions and his sentence. The appellate court affirmed his convictions but remanded for resentencing under the version of the Sentencing Reform Act that was in existence when Kelly committed his crimes. CP 50, 72.

The mandate from this appeal was issued on June 29, 2009. CP 48.

At the post-appeal resentencing, the parties and the court realized that a properly calculated standard range sentence was longer than the exceptional sentence above the standard range that the court of appeals had vacated. CP 88. The sentencing court reduced the severity of the new sentence by imposing an exceptional sentence below the standard range in which the sentences for theft of a firearm and unlawful possession of a firearm ran concurrently, rather than consecutively. CP 76-90; 2021 RP 8. This resulted in a new term of incarceration of 387 months. CP 82. Kelly did not appeal this sentence, so it became final on September 25, 2009, the date it was filed with the clerk. RCW 10.73.090(3)(a).

On November 4, 2021, twelve years after the post-appeal resentencing was held, Kelly was before the trial court for entry of an order adjusting his offender score and sentence to account for the holding in *State v. Blake,* 197 Wn.2d 170, 481 P.3d 521

(2021). *See* CP 106; 2021 RP 3. Kelly did not file a written motion prior to the hearing.

The State requested that the court correct Kelly's offender score and leave the imposed sentence otherwise undisturbed. 2021 RP 12. The State made this request because while Kelly's offender scores decreased from the old high of 26.5 and low of 21.5, to a new high of 23 and new low of 19, his standard range on each count remained the same. CP 108-09; 2021 RP 6-7, 9.

Kelly, without identifying any applicable exception to RCW 10.73.090's one-year time bar on collateral attacks or any other authority that would permit a complete resentencing, requested that the court impose terms at the bottom of the standard ranges for all counts, maintain the mitigated exceptional sentence structure from the 2009 resentencing hearing, and run the sentence in this cause number concurrently with the sentence in 05-1-00889-1. 2021 RP 18-19. In making these requests, Kelly acknowledged that the two firearm enhancements must run consecutive to each other and to the terms imposed on all other

counts. 2021 RP 19 ("And then the two firearm enhancements consecutive to that. So that being a total of 120 months – 60 on Count 1 and 60 on Count 5.").

While Kelly made a passing reference to *State v. McFarland*, 189 Wn.2d 47, 300 P.3d 1106 (2017), which allows for exceptional sentences to mitigate the harshness associated with the statute mandating that theft of a firearm and unlawful possession of a firearm counts must run consecutively to each other, he never specifically requested that the court run the firearm enhancements concurrently to each other. *See* 2021 RP 19-20. Kelly presumably refrained from doing so because binding precedent barred the request for offenders who, like him,[5] committed their crimes after their eighteenth birthday. *See, e.g., State v. Brown*, 139 Wn.2d 20, 25-29, 983 P.2d 608 (1999), *abrogated with respect to defendants tried in adult court for*

[5] Kelly, who was born on May 14, 1974, was 29 years old when he engaged in the conduct that led to his convictions in this matter. CP 1-8, 17, 29, 76.

crimes committed prior to their eighteenth birthday by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. Wright*, 19 Wn. App. 2d 37, 50, 493 P.3d 1220 (2021), *review denied*, 199 Wn.2d 1005 (2022); *State v. Mandefero*,14 Wn. App. 2d 825, 836-37, 473 P.3d 1239 (2020); *State v. Brown*, 13 Wn. App. 2d 288, 466 P.3d 244, *review denied*, 196 Wn.2d 1013 (2020).

The court denied Kelly's request that the sentence in this case run concurrently to the sentence Kelly had already completed in 05-1-00889-1 due to the "multitude of crimes" committed between the two cause numbers. 2021 RP 27. Although not related to *Blake*, Judge Sorensen took "advantage of the exceptional sentence that Judge Culpepper declared," by "allow[ing] the firearm sentence enhancements to run [] concurrent to each other." 2021 RP 25. *See also* RP 28-29; CP 109, 111. The State presented an order to the court that conformed with its decision. CP 114.

The State filed a timely appeal from the Order Correcting Judgment and Adjusting Sentence Pursuant to *Blake*. CP 112. After the State filed its brief of appellant challenging the imposition of concurrent firearm enhancements, Kelly was granted leave to file a late notice of cross-appeal. The State's and Kelly's appeal in this case has been linked with Kelly's appeal in 05-1-00889-1.

C. Argument

1. An Objection in the Trial Court is Not a Prerequisite to Review of a Sentence that Exceeds the Trial Court's Authority

Issues raised for the first time on appeal will generally not be considered on appeal. But an exception to this rule is lack of trial court jurisdiction. RAP 2.5(a)(1). This exception applies where a sentencing court exceeds its statutory authority in imposing a sentence that is contrary to law. *State v. Wiley*, 63 Wn. App. 480, 482, 820 P.2d 513 (1991). This exception or its common law analog applies equally to appeals filed by the State and by criminal defendants. *State v. Paine*, 69 Wn. App. 873,

881-94, 850 P.2d 1369 (1993). The purpose of this exception is to bring sentences into conformity and compliance, with existing sentencing statutes. *Id.* at 884.

This exception has some limits. It will not apply to a challenged sentence term that depends upon a case-by-case analysis. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) (unpreserved LFO errors do not command review because a judge must conduct a case-by-case analysis to arrive at an LFO order appropriate to the individual defendant's circumstances). A judge, however, is barred by both statute and case law from performing a case-by-case analysis with respect to firearm enhancements imposed for crimes committed when a defendant was at least 18 years old. *See generally Brown*, 139 Wn.2d at 25-29; *Wright*, 19 Wn. App. 2d at 50; *Mandefero*, 14 Wn. App. 2d at 836-37; RCW 9.94A.533(3)(e).

Thus, to the extent the State's request in the trial court that *Blake* relief be limited to a correction of Kelly's offender scores was insufficient to preserve a challenge to the trial court's *sua*

sponte decision to run Kelly's two firearm enhancements concurrent with each other, the State may assert the error in this court.

2. An Appellate Court has the Power and Duty to Correct a Sentence Which Exceeds a Trial Court's Authority

In the instant case Kelly contends that the State did more than fail to object in the trial court to the imposition of concurrent firearm enhancements. Kelly contends that the State contributed to the error by preparing and presenting an order for the trial court to sign that memorialized the trial court's oral ruling that the firearm enhancements were to be served concurrently. Brief of Respondent/Cross-Appellant at 14. Kelly cites a single, distinguishable, unpublished case in support of his claim that preparation of an order in compliance with the court's ruling "invites" the error. *Id.* at 15 (citing *State v. Franklin*, 14 Wn. App. 2d 1031, 220 WL 5437819 (2020) (unpublished)).

In *State v. Franklin*, 14 Wn. App. 2d 1031, 220 WL 5437819 (2020) (unpublished), a sympathetic defendant was

before the court for sentencing on one count of unlawful possession of a controlled substance (UPCS). The defendant had been clean and sober for 17 months and was currently complying with Department of Corrections supervision from other cases. *Id.* at *1. The trial court expressed a desire to impose a mitigated sentence so that the defendant could maintain her current employment. *Id.* at *1-2. The State not only agreed that a mitigated exceptional sentence would be appropriate under these circumstances, it presented the trial court with proposed findings of fact and conclusions of law to support such a sentence. *Id.* at *2. The sentencing court adopted the State's proposed findings as its own and imposed an exceptional mitigated sentence. *Id.* The State's drafting of the proposed findings barred its appeal in which it claims that the reasons provided by the trial court did not justify the defendant's exceptional sentence. *Id.* at 3.

In the instant case, the State never agreed to or approved of the trial court's imposition of concurrent firearm enhancements. The State did not pre-propose an order justifying

the court's decision to impose concurrent firearm enhancements. The State merely prepared an order memorializing the court's oral ruling that the firearm enhancements would be served concurrently. *See* 2021 RP 28 (court recessing so order could be prepared). In fact, the provisions directing that the firearm enhancements be served concurrently were all handwritten additions to the State's prepared order. And it appears that the handwritten notations were made by the judge. *See* CP 109-11; 2021 RP 28-29. Thus, this case is factually distinguishable from *Franklin.*

The unpublished decision in *Franklin* moreover is contrary to a long line of cases that hold the invited error doctrine does not apply where a sentence is outside the authority of the sentencing court. *See, e.g., In re Pers. Restraint of West*, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005). The invited error doctrine does not apply to sentencing errors in this category because only the legislature can fix legal punishments for criminal offenses. *State v. Mercado*, 181 Wn. App. 624, 631,

326 P.3d 154 (2014). Parties, through agreement or failure to object, cannot authorize a punishment that is contrary to what the legislature permits. *State v. Barber*, 170 Wn.2d 854, 870, 872 n. 4, 248 P.3d 494 (2011); *State v. Wallin*, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (2005).

3. An Appellate Court May Not Ignore or Overrule Washington Supreme Court Precedent

Resolution of the State's appeal is controlled by the Washington Supreme Court's decision in *Brown*[6]. The *Brown* case holds, as to defendants who were 18 years of age or older when they committed their crimes, that trial courts may not deviate from the term of confinement required by the deadly weapon or firearm enhancement language of RCW 9.94A.533. Kelly urges this court to ignore *Brown* and the recent court of appeals decisions recognizing the continuing vitality of *Brown* on policy grounds. *See* Brief of Respondent/Cross-Appellant at 15-23.

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[6] *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999)

Kelly's request must be denied because *Brown* is binding on all lower courts until it is overruled by the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227, 231 (1984). The Washington Supreme Court will only overrule its own precedent if the precedent is both incorrect and harmful. *See, e.g., State v. Barber*, 170 Wn.2d 854, 864-65, 248 P.3d 494 (2011). Incorrectness and harmfulness are separate inquires. *State v. Otton*, 185 Wn.2d 673, 687-88, 374 P.3d 1108 (2016). Neither of which Kelly has satisfied. This court, moreover, has "no authority to overrule, revise, or abrogate a decision by [the Washington] Supreme court." *Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 211, 444 P.3d 1235 (2019). This court has previously rejected an identical request to that presented by Kelly. *See Brown*, 13 Wn. App. 2d at 291.

Binding case law mandates that those portions of the *Blake* order that ordered Kelly's two firearm enhancements to be served concurrently to each other be reversed. *See* CP 109-111.

4. The One-Year Time Bar on Collateral Attacks Precludes a Remand for Resentencing and Any Changes to the 2009 Judgement and Sentence Other Than the Correction of Kelly's Offender Score

Kelly's judgment is facially valid because the terms of incarceration imposed on all ten counts did not exceed the trial court's authority. The only error Kelly identified in the 2009 judgment and sentence concerns the calculation of the offender score. Due to the age of Kelly's conviction, the only authority the trial court possessed in the *Blake* hearing was to correct the offender scores. Because Kelly's *Blake* corrected offender scores yield the same standard ranges as his 2009 calculated offender scores,[7] Kelly's request that this court remand for a resentencing if it finds that the trial court was barred from ordering the firearm enhancements to be served concurrently to

[7] *See State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008) ("A defendant's standard range sentence reaches its maximum limit at an offender score of nine."). Kelly's *Blake*-corrected offender scores are still well above nine. CP 108-09; 2021 RP 6-7, 9.

each other must be denied. *See* Brief of Respondent/Cross-Appellant at 24.

A post-sentencing motion for *Blake* relief is a form of collateral attack. RCW 10.73.090(2). All collateral attacks must be filed within one year of the date a conviction or sentence becomes final unless the judgment is facially invalid, or a statutory exception applies. RCW 10.73.090; RCW 10.73.100; CrR 7.8(b). Because Kelly's judgment and sentence became final in 2009 when the judgment and sentence was filed with the clerk, RCW 10.73.090(3)(a), his request for a remand for resentencing is, absent an exception, barred by RCW 10.73.090.

The one–year time limit for filing a collateral attack in RCW 10.73.090 is not a blanket limitation. Broad exceptions are given for newly discovered evidence, convictions under unconstitutional statutes, convictions barred by double jeopardy, convictions obtained with insufficient evidence, sentences in excess of the court's jurisdiction, or significant changes in the law

which will apply retroactively to the petitioner's case. RCW 10.73.100.

Kelly bears the burden of proving one of these exceptions before any resentencing can occur in this case. *Shumway v. Payne*, 136 Wn.2d 383, 399-400, 964 P.2d 349 (1998). To meet his burden of proof, Kelly must state the applicable exception within his motion or brief. *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.2d 1005 (2001). Kelly did not file a written motion for relief in the trial court, Kelly did not orally identify an applicable exception to RCW 10.73.090 in the trial court, and Kelly has not identified any applicable exception to the one-year time limit in his Brief of Respondent/Cross-Appellant.

While *Blake* falls within the scope of RCW 10.73.100(6)'s retroactivity exception with respect to UPCS, it has limited impact with respect to other crimes. *Blake* declared prior simple UPCS law to be unconstitutional, it did not declare convictions for any other crime to be unconstitutional. The sole impact of *Blake* on other crimes is that UPCS convictions must be removed

from the offender score calculations for those crimes. *See State v. Jennings*, 199 Wn.2d 53, 67, 502 P.3d 1255 (2022). This is because *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986), *amended by* 105 Wn.2d 175, 718 P.2d 796 (1986), prohibits the inclusion of unconstitutional convictions in the determination of the offender score and the standard range sentence. But no rule from *Ammons* results in a per se facially invalid sentence that requires resentencing in all cases.

Facial invalidity only occurs when "the court actually exercised a power it did not have." *In re Pers. Restraint of Flippo*, 187 Wn.2d 106, 111, 385 P.3d 128 (2016). Facial invalidity exists if a trial court lacked the statutory authority to impose a sentence. *In re Pers. Restraint of Scott*, 173 Wn.2d 911, 916-17, 271 P.3d 218 (2012). "'Invalid on its face' does *not* mean that the trial judge committed some legal error." *Id.* at 916 (emphasis in the original); *see also In re Pers. Restraint of Coats*, 173 Wn.2d 123, 144, 267 P.3d 324 (2011) ("only errors that

result from a judge exceeding the judge's authority render a judgement and sentence facially invalid.").

Washington courts have found invalidity where the trial judge has imposed an unlawful sentence, or when the offender has been given a longer sentence than the statutory maximum authorized by law. *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 175–76, 196 P.3d 670, 672 (2008) (sentence exceeded statutory maximum; remanded for resentencing within the standard range). Courts have also found facial invalidity on the judgment and sentences of offenders convicted of nonexistent crimes. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). *Accord In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) (judgment and sentence invalid when defendant pleaded guilty to "an offense which was not criminal at the time he committed it").

Facial invalidity will not be found in cases in which there is "a technical misstatement that had no actual effect on the rights of the petitioner." *In re Pers. Restraint of McKiearnan*, 165

Wn.2d 777, 783, 203 P.3d 375 (2009)). A miscalculated offender score is a technical misstatement that does not render a judgment facially invalid so long as the sentence imposed was authorized under the Sentencing Reform Act (SRA). *In re Pers. Restraint of Toledo-Sotelo*, 176 Wn.2d 759, 767, 770, 297 P.3d 51 (2013). Only when the miscalculated offender score alters the standard range, and the imposed sentence exceeds the corrected standard range is the sentence not authorized by the SRA. *Id*.; *Coats*, 173 Wn.2d at 136.

Facial invalidity is not a "super exception" to the one-year time limit. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 309 P.3d 451 (2013). The existence of a facial invalidity only authorizes the court to address the facial invalidity. *Id.* at 425. The court is precluded from considering other time barred claims. *See In re Pers. Restraint of Snively*, 180 Wn.2d 28, 320 P.3d 1107 (2014) (community placement ordered for indecent liberties properly struck from judgment and sentence, but the facial invalidity did not allow the defendant to pursue his

otherwise time barred claim to withdraw his guilty plea on the grounds he was misadvised of the community custody term); *West*, 154 Wn.2d at 215 (correcting an erroneous portion of a sentence does not affect the finality of those portions of the judgment and sentence that were correct and valid when imposed).

The mere existence of a facial invalidity, moreover, does not entitle a defendant to relief absent a showing of prejudice. Even where a judgment and sentence is invalid with respect to the calculation of the offender score, a defendant must establish that the invalidity results in a complete miscarriage of justice. *West*, 154 Wn.2d at 209. Kelly has not and cannot satisfy this burden because his standard range was not altered by the removal of his prior UPCS convictions from his offender score. In fact, his Brief of Respondent/Cross-Appellant does not even contain the word "prejudice" or "prejudiced." Kelly's request for a remand for resentencing must, therefore, be denied.

D. Conclusion

The State respectfully requests that the trial court's order directing the two firearm enhancements imposed upon Kelly for crimes committed as an adult be served concurrently be reversed. The matter should be remanded with instructions that the trial court must file an order directing that the two enhancements be served consecutively to each other and consecutive to all other terms of confinement as ordered in the 2009 judgment and sentence.

II. STATE'S RESPONSE TO DEFENDANT'S CROSS-APPEAL

A. Introduction

Timothy Kelly sought relief from his judgment and sentence pursuant to *Blake* many years after his convictions became final. Kelly appeals from the court's order on *Blake*, claiming that it should have ordered the sentence in this cause number to run concurrently with the already expired sentence in another cause number. Kelly further contends that the trial court

should have altered his legal financial obligations (LFOs) to comply with current law.

A trial court's authority in a CrR 7.8(b) *Blake* hearing, however, is limited by RCW 10.73.090. While the trial court has the power to amend facially invalid offender scores in a judgment and sentence, it may not alter facially valid portions of the judgment and sentence. In the instant case, the removal of Kelly's prior unconstitutional UPCS convictions did not result in a change in his standard range or render other portions of his judgment and sentence facially invalid. The trial court, therefore, lacked the power to make any alterations to Kelly's LFOs or to that portion of the 2009 judgment and sentence that ordered this case to be served consecutively to the sentence imposed in 05-1-00889-1. Kelly's appeal must be rejected.

B. Counterstatement of Issues Presented in Cross-Appeal

Is a trial court in a collateral attack filed more than one year after the judgment and sentence became final limited to correcting prejudicial facial invalidities in the judgment and sentence?

C. Argument

Although the trial court heard Kelly's collateral attack seeking relief pursuant to *Blake* in this case at the same hearing as it considered Kelly's collateral attack on another cause number, Kelly was not sentenced on both cause numbers the same day. Kelly had completed his sentence in the other cause number long before the November 4, 2021, *Blake* hearing. The trial court, therefore, denied Kelly's request for resentencing in that matter. 2021 RP 28.

Kelly's judgment and sentence for all ten convictions in this case became final in 2009. RCW 10.73.090(3)(a). The court properly identified the standard range for Kelly's then astronomical offender score. While *Blake* created a facial invalidity as to the offender scores in the judgment and sentence due to the inclusion of prior UPCS convictions, the standard ranges for all crimes remained the same. Under these circumstances the only relief the trial court could provide Kelly was a correction of the offender scores.

Kelly's request for additional changes to his 2009 sentence is barred by RCW 10.73.090. Kelly's failure to identify any applicable exception to RCW 10.73.090 requires this court to deny his request for a remand with directions to amend his LFOs and to run the sentence in this case concurrent with the sentence imposed in 05-1-00889-1.

1. Kelly's Briefing Regarding the Applicability of RCW 9.94A.589(1) to Collateral Attacks and Remand for Resentencing Is Insufficient to Merit Judicial Consideration

As to each error alleged, an appellant has a duty to provide the court with reasoned argument and citation to legal authorities. Kelly's brief fails to do so with respect to his "resentencing" claims. This court should decline to reach the merits due to insufficient briefing.

Kelly asserts in a single paragraph that the trial court was required to order his December 2006/2009 sentence in this case to be served concurrently with his June 2006 sentence in 05-1-00889-1. *See* Brief of Respondent/Cross-Appellant at 25; 2021 RP 9. Kelly supports his thesis with a citation to a statute, RCW

9.94A.589(1), that requires sentences imposed on the same day to be served concurrently. *Id.* Kelly fails, however, to provide any argument as to how this statute applies to collateral attacks on sentences imposed months or years apart where a resentencing is barred by RCW 10.73.090.

Kelly's passing treatment of this issue and his lack of reasoned argument is insufficient to merit judicial consideration. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012); RAP 10.3(a)(6). Kelly's failure to cite any legal authority in support of his thesis constitutes a concession that the claim lacks merit. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search); *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the argument lacks merit). The trial court, therefore, did not err by denying Kelly's oral request that it alter the consecutive nature of this sentence vis-à-vis his already completed sentence in 05-1-00889-1.

Kelly's claim that the remedy for a *Blake* error is always resentencing lacks any discussion of RCW 10.73.090 or its exceptions, and is silent with respect to actual prejudice. *See* Brief of Respondent/Cross-Appellant at 25-26. Kelly's position that he is entitled to resentencing is based solely upon direct appeal cases and collateral attacks heard before the judgment and sentences became final, rather than 12 years later. Kelly offers no reasoned argument as to the applicability of these cases to the facially valid portions of a long-final judgment and sentence.

In *State v. Jennings*, 199 Wn.2d 53, 502 P.3d 1255 (2022), the parties in *Jennings* agreed that resentencing was required due to the removal of the defendant's prior UPCS from his offender score. Brief of Appellant at 25 (citing *Jennings*, 199 Wn.2d at 67). Apart from the fact that Jennings' sentence was not yet final for purposes of RCW 10.73.090, a remand was required in that case because the removal of the UPCS points from his offender score for murder changed Jennings's standard range. *See State v. Jennings*, Washington Supreme Court Cause No. 99337-8,

Supplemental Brief of Petitioner at 21 (July 7, 2021)[8] (offender score of eight included two points for prior convictions for possession of a controlled substance); RCW 9.94A.510 (standard range sentence for a seriousness level XIV crime with an offender score of "8" is 257-357 months and with an offender score of "6" is 195-295 months). The removal of UPCS points from Kelly's offender scores do not change his standard ranges.

Kelly also cites to *State v. Markovich*, 19 Wn. App. 2d 157, 492 P.3d 141 (2021), *review denied*, 198 Wn.2d 1036, 501 P.3d 141 (2022). Brief of Appellant at 26. *Markovich* is distinguishable from Kelly's situation because the collateral attack based upon *Blake* was filed before Markovich's sentence became final, rather than 12-years later. *Id*. at 166 & n. 2. Thus, Markovich did not need to prove that his request for resentencing fell within the "facially invalid" or an RCW 10.73.100(6)

[8] This document may be found at https://www.courts.wa.gov/content/Briefs/A08/993378%20Petitioners%20Supplemental%20Brief.pdf (last visited Jul. 6, 2022).

exception. Kelly, however, must establish an exception to the one-year time bar on collateral attacks before any court can alter the facially valid components of his sentence.

Kelly's failure to provide this court with relevant citations to legal authority and to reasoned analysis merits denial of his cross-appeal.

2. The Sole Remedy for a Sentencing Error in a Time-Barred Collateral Attack is Correction of Any Facial Invalidities

A post-sentencing motion for *Blake* relief is a form of collateral attack. RCW 10.73.090(2). All collateral attacks must be filed within one year of the date a conviction or sentence becomes final unless the judgment is facially invalid, or a statutory exception applies. RCW 10.73.090; RCW 10.73.100. Because Kelly's judgment became final in 2009 when the judgment and sentence was filed with the clerk, his request to have the sentence in this matter run concurrently with the sentence imposed in 05-1-00889-1, and for other alterations to

the 2009 sentence were and remain time-barred for the reasons identified *supra* in section I. C. 4.

The removal of Kelly's prior UPCS convictions from his offender scores as required by *Blake* did not reduce the scores below nine. His standard ranges, therefore, remain unchanged. *See State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008) ("A defendant's standard range sentence reaches its maximum limit at an offender score of nine."). In imposing a sentence within that standard range, the 2006 and 2009 sentencing courts did not exercise a power they did not have. Thus, the error in the offender score did not provide any basis for the trial court to alter the terms of incarceration in this long final case. *West*, 154 Wn.2d at 215.

Kelly was originally sentenced in this matter six months after sentence was imposed in 05-1-00889-1 and was resentenced in this case more than three years after sentence was imposed in 05-1-00889-1. The law in effect when Kelly committed the crimes charged in this case permitted a trial court to order that

the sentence in this case be served consecutively to the sentence in 05-1-00388-1. *See* Former RCW 9.94A.589(3) (Laws of 2002, ch. 175, § 7). In imposing consecutive sentences, the trial court did not exercise a power it did not have. Thus, the error in the offender score did not provide any basis for the trial court to alter the consecutive nature of the sentence in this long final case. *West*, 154 Wn.2d at 215.

The sentencing court imposed the following LFOs on Kelly: (1) $500 crime victim assessment; (2) $100 DNA database fee; (3) $200 criminal filing fee; and (4) restitution. CP 79. The crime victim assessment, restitution, and DNA database fee were all authorized by statutes in effect on the date Kelly committed his offense and at the time of his 2006 sentencing and his 2009 resentencing. *See* Former RCW 10.01.160 (Laws of 1995, ch. 221, § 1); Former RCW 9.94A.760 (Laws of 2001, ch. 10, §3); Former RCW 9.94A.753 (Laws of 2000, ch. 226, § 3); Former RCW 7.68.035 (Laws of 2000, ch. 71, § 3); Former RCW 43.43.7541 (Laws of 2002, ch. 289, § 4). While assessment of

the criminal filing fee was also authorized by statutes in effect on the date Kelly committed his offense, the amount specified by the statute was $110, not $200. Former RCW 36.18.020 (Laws of 2000, ch. 9, § 1(2)(b)). The proper remedy for this facial error is entry of a CrR 7.8(a) order reducing the amount of the filing fee, not resentencing.[9] *West*, 154 Wn.2d at 215.

3. Kelly Cannot Demonstrate Actual Prejudice from the Miscalculation of His Offender Score or the Error in the Amount of the Filing Fee

A defendant in a collateral attack must establish actual prejudice from the claimed error to obtain relief. Kelly fails to do so, merely positing that the judge who presided over the *Blake* hearing might reduce his sentence if given another opportunity. *See* Brief of Respondent/Cross-Appellant at 24. But as discussed above, RCW 10.73.090 bars any reductions in Kelly's 2009 sentence.

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[9] Kelly does not need to be present for entry of such an order. *See In re Pers. Restraint of Sorenson*, 200 Wn. App. 692, 701-03, 403 P.3d 109 (2017)

In any collateral attack, including one brought pursuant to *Blake*, the defendant must establish actual prejudice to obtain relief. "Mere error is not enough to obtain collateral relief." *State v. Buckman*, 190 Wn.2d 51, 61, 409 P.3d 193 (2018). A petitioner must show actual and substantial prejudice to warrant relief for constitutional error. *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 316, 440 P.3d 978 (2019). Non-constitutional errors, such as the statutory miscalculation of an offender score as in Kelly's case or an error in the amount of the filing fee, require a fundamental defect which inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 876 50 P.3d 618 (2002); *State v. Chambers*, 176 Wn.2d 573, 584, 293 P.3d 1185 (2013). This rule applies with equal force to facial invalidities. *West*, 154 Wn.2d at 209.

Kelly cannot demonstrate actual prejudice from the error in his offender score because a *Blake* corrected offender score results in the same standard range. Even in a direct appeal an offender-score miscalculation is harmless where the standard

range remains the same. *State v. Fleming*, 140 Wn. App. 132, 138, 170 P.3d 50 (2007). Only a reduced standard range, not a reduced offender score, requires resentencing on remand. *State v. Priest*, 147 Wn. App. 662, 673, 196 P.3d 763 (2008); *State v. Kilgore*, 141 Wn. App. 817, 824-25, 172 P.3d 373 (2007), *affirmed by State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

Kelly also cannot demonstrate actual prejudice from the $90 error in the amount of the filing fee. Kelly, while incarcerated, has limited earning capacity. While any wages he earns while in the Department of Corrections (DOC) and all funds in his DOC account are subject to specific deductions for LFOs, see RCW 72.09.480(2), the amounts collected will be small. The money deducted from his DOC account that are received by the clerk to be applied toward LFOs must be applied to restitution first, the crime victim penalty second, followed by the remaining costs, fines, and assessments. RCW 9.94A.760(2).

In other words, it is highly unlikely that Kelly has made any payment toward the clerk filing fee.

Currently, Kelly, if indigent and unable to pay the clerks filing fee, may have the fee remitted when he is released from total custody. *See* RCW 10.01.160(4) (Laws of 2018, ch. 269, § 6(4)). After January 1, 2023, Kelly may have this LFO remitted while he is still in DOC custody. *See generally* Laws of 2022, chapter 260, § 9 (effective date January 1, 2023). Kelly's ability to eliminate the filing fee obligation prior to paying it, prevents him from establishing that the $90 error in the clerk's filing fee results in a complete miscarriage of justice. *West*, 154 Wn.2d at 209. Kelly's request for remand for resentencing must be denied.

D. Conclusion

The relief Kelly seeks in his cross-appeal is barred by RCW 10.73.090. The lawful facially valid portions of Kelly's 2009 sentence must be honored.

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RESPECTFULLY SUBMITTED this 29th day of July, 2022.

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